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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

JEROME S. CARDIN,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment permits a trial judge to conduct an "accusatory" interrogation of a criminal defendant, at the conclusion of the defendant's direct and cross-examination, utilizing a letter that has not been introduced into evidence and conveying to the jury the judge's disbelief of the defendant.

2. Whether the Fourteenth Amendment permits a trial jury to find a defendant guilty of theft under jury instructions that explicitly authorize such a verdict if some of the jurors believe that the defendant has taken property without authority while others believe that he knowingly possessed stolen property and yet others believe he used deception to obtain property.

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JEROME S. CARDIN,
v. *Petitioner,*

STATE OF MARYLAND,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

OPINIONS BELOW

The order of the Maryland Court of Appeals denying a writ of certiorari (Pet. App. A, p. 1a, *infra*) is reported at 312 Md. 126, 538 A.2d 777. The decision of the Maryland Court of Special Appeals (Pet. App. B, pp. 2a-34a, *infra*) is reported at 73 Md. App. 200, 533 A.2d 928.

JURISDICTION

The order of the Maryland Court of Appeals denying a writ of certiorari was issued on March 28, 1988. On May 9, 1988, petitioner applied to this Court for an extension of time to file a petition for a writ of certiorari. On May 11, 1988, Chief Justice Rehnquist granted an extension of time to and including June 26, 1988 (Pet. App. C, p. 35a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

The Sixth and Fourteenth Amendments to the United States Constitution and Md. Ann. Code, Art. 27, §§ 340-343 are reproduced in Pet. App. D, pp. 37a-46a, *infra*.

STATEMENT

In May 1985, Old Court Savings and Loan Association, Inc. of Baltimore ("Old Court") was placed into conservatorship. The failure of the institution precipitated a savings-and-loan crisis throughout the state of Maryland in which tens of thousands of depositors were unable to withdraw their savings. The crisis generated substantial notoriety in the press and electronic media. Jeffrey A. Levitt, the president of Old Court since September 1982, became the focus of an intensive investigation conducted by the Maryland Attorney General's Office. In May 1986, to the accompaniment of massive publicity in the Baltimore and Washington metropolitan areas, Levitt pleaded guilty to theft and misappropriation of almost \$15 million from Old Court. He was sentenced to 30 years' imprisonment.

Petitioner formed Old Court in 1959 and operated it conservatively and profitably in the 1960's and 1970's. Because of escalating interest rates, the institution became unprofitable in the early 1980's. Officials of the Maryland Savings Share Insurance Corporation ("MSSIC"), a private insurance authority that participated with state agencies in the regulation of the Maryland savings and loan industry, directed petitioner to find a source of fresh capital and introduced him to Jeffrey Levitt and Allan Pearlstein (Tr. 11/24/86, p. 87).¹ Following negotiations, petitioner sold his controlling interest in Old Court to Levitt and Pearlstein (Tr. 11/24/86, pp. 87-88).

Under the contract of sale, which was approved by the State of Maryland and by MSSIC, petitioner retained an 18 percent stock interest in Old Court. The sales agreement also granted petitioner's law firm, Cardin &

¹ "Tr. 11/24/86" refers to the trial transcript of November 24, 1986. Each day's transcript volume of pretrial and trial proceedings is designated by "Tr." and the date of the proceeding.

Cardin, P.A., or its designee a 50 percent interest in settlement fees collected by Levitt's office on any real estate closings done for Old Court loans.²

Fees were paid to petitioner by Levitt pursuant to these clauses between 1982 and 1985. The present conviction concerns five payments made or approved by Levitt and paid to petitioner in 1984 and 1985 totaling \$385,000. Petitioner testified that the payments were made pursuant to the contract clauses previously described—specifically, three of the payments were made under the fee-splitting arrangement and two were distributions on account of petitioner's 18 percent interest in Old Court.

Petitioner was charged with theft for having received these five payments from various entities controlled by or associated with Levitt. In four of the instances, invoices describing unperformed services were provided by petitioner, although there was no evidence that Levitt or anyone else with any authority with regard to the payments relied on the invoices in making the challenged payments. Petitioner testified that Levitt knew that these five payments represented amounts due to petitioner and had instructed petitioner to provide these invoices for Levitt's convenience. Levitt was obviously a critical witness in determining the credibility of petitioner's testimony, and Levitt had pleaded guilty and been sentenced. Nonetheless, the prosecution did not call Levitt as a witness in petitioner's trial.

Petitioner's counsel moved before trial for a six-month continuance because of the enormous prejudicial newspaper and media publicity. The record contains 3,200 newspaper articles distributed in the Baltimore area before the trial relating to Levitt, Old Court, and the

² Since petitioner was the sole shareholder of his law firm, he personally controlled 50 percent of the settlement fees collected by Levitt.

savings and loan crisis. A pretrial public opinion poll showed that 61 percent of the community from which potential jurors were to be selected believed that the owners of Old Court (one of whom was petitioner) had engaged in criminal activity (Defendant's Motion for a Continuance Because of Prejudicial Pretrial Publicity, Exhibit B). The trial court denied the motion for a continuance (Tr. 9/29/86, pp. 43-45). At the very time petitioner's trial began, moreover, there was new publicity linking him to the Maryland savings and loan crisis (Tr. 11/3/86, pp. 8-13).

All the potential jurors acknowledged that they had read or heard of the savings and loan crisis. In his introductory questions during the *voir dire*, the trial judge asked who had *not* heard of Maryland's savings and loan crisis (*E.g.*, Tr. 11/5/86, pp. 40-41). Most potential jurors knew of Levitt and some affirmatively stated that Levitt deserved a long jail term (Tr. 11/5/86, p. 117; Tr. 11/6/86, p. 114). It was difficult, if not impossible, for ordinary jurors to distinguish between Levitt and petitioner, who had sold Old Court to Levitt and received substantial sums of money from Levitt under his governmentally approved sales contract.

Petitioner's trial was relatively short because there was no factual issue at trial apart from the question of petitioner's understanding regarding the five payments. Petitioner denied that he had obtained the funds by theft, asserting consistently that he believed he was entitled to the money under his sales contract. Petitioner's testimony took two of the proceeding's eight trial days. After his cross-examination was concluded, the trial judge began an interrogation that covered ten pages of the trial transcript and that communicated to the jury the judge's disbelief of petitioner. Throughout this examination, the judge assumed an "accusatory tone," as noted by petitioner's counsel in his contempo-

aneous objection (Tr. 11/25/86, p. 232).³ The full interrogation is reprinted as Appendix E, pp. 47a-52a, *infra*.

There was absolutely no evidence that Levitt was misled by the contents of the invoices. The checks involved in all the five payments were signed or approved by Levitt. Consequently, there was substantial uncertainty at trial over how petitioner could have been guilty of "theft" in receiving money when a fully knowledgeable individual made or authorized the payments that allegedly constituted the "theft."

Maryland's theft statute, Md. Ann. Code, Art. 27, § 342 (Appendix D, pp. 42a-45a, *infra*), enumerates five distinct ways in which the offense of theft can be committed. Petitioner asked the trial judge to instruct the jury that it must unanimously agree on the "form of theft" that petitioner had committed.⁴ The trial judge

³ The court below acknowledged that defense counsel's "characterization was not disputed by the judge or the State's Attorney" (p. 33a, *infra*). It found, however, that "the trial judge implicitly rejected appellant's assessment of his conduct in denying appellant's motion for a mistrial" (*id.*). The trial judge, however, may have agreed that his examination was "accusatory" and have mistakenly believed that an "accusatory" interrogation did not warrant a mistrial.

⁴ Petitioner's Requested Jury Instruction No. 16 read as follows:

Before you can find the defendant guilty of any of these three forms of theft, the State must prove beyond a reasonable doubt all of the elements of one of the forms of theft. You cannot return a unanimous verdict of guilty unless you all agree that the defendant committed a particular form of theft. It is not sufficient if the State proves some of the elements of one form of theft, and some elements of another form of theft. Nor is it sufficient if six of you find that the defendant is guilty of one form of theft, and six of you find that he committed another form of theft. Unless the State demonstrates beyond a reasonable doubt that the defendant committed all of the elements of a particular form of theft, you must find the defendant not guilty.

rejected that request and instead offered the jury a smorgasbord of different legal theories (Tr. 12/3/86, pp. 15-17 (emphasis added)) :

The defendant is charged with five counts of theft. A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over the property of the owner and has the purpose of depriving the owner of the property or willfully or knowingly uses or conceals the property in such a manner as to deprive the owner of the property.

A person also commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control over the property of the owner and has the purpose of depriving the owner of the property or willfully or knowingly uses, conceals or abandons the property in such manner as to deprive the owner of the property or uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of the property.

A person also commits the offense of theft if he possesses stolen property knowing that it has been stolen or believing that it has probably been stolen or believing or have the purpose of depriving the owner of the property or willfully or knowingly uses, conceals or abandons the property in such manner as to deprive the owner of the property, or uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of the property.

These methods of theft may be proven in the alternative. The State need not prove that the defendant acted in all of these fashions to commit theft. It need only prove beyond a reasonable doubt that all of the elements of one or more forms of theft have been proven, nor need all of the members of this jury agree on which of these methods of theft were committed by the defendant. All that is required is that

all members of you, the jury, are convinced beyond a reasonable doubt that all elements of one or more forms of theft have been proven.

In this case, the defendant has been charged in each theft count with theft of \$300 or more. In order for the defendant to be guilty of these offenses, the State must prove, one, that Old Court Savings and Loan, Incorporated, Old Court Joint Venture, Incorporated, Old Court Investment Corporation, or Galleria Enterprises of Maryland, as the case may be, was the owner of certain properties; two, that the defendant willfully or knowingly obtained control that was unauthorized, used deception to obtain control or exerted unauthorized control over the property or received property knowing it was stolen or believing that it was probably stolen; three, that the defendant intended to deprive the owner of the property or knowingly used or concealed the property in such a manner as to deprive the owner of the property; and, four, that the value of the property was \$300 or more.

Petitioner objected to this instruction (Tr. 12/2/86, pp. 64-65; Tr. 12/3/86, p. 20).

In his closing argument, the prosecutor emphasized the license given to the jury by the trial judge (Tr. 12/3/86, pp. 22-23) :

As the Court has instructed you, your verdict must be unanimous but it is not necessary that you all agree on which form of theft applies. In other words, six of you may find that the crimes charged are theft by deception. Six others may find it is exerting unauthorized control. Your verdict would still be unanimous that the crime of theft had been committed, no matter what form of theft each of you may decide upon.

The jury quickly found the petitioner guilty on all counts. The trial judge demonstrated his animus toward petitioner by sentencing him to the maximum of 15

years' imprisonment on each of the five counts, the sentences to run concurrently. He also attempted to imprison petitioner immediately upon sentencing, denying bail pending appeal. Another Circuit Court Judge, hearing a petition for habeas corpus, thereafter released petitioner on \$3 million bail.

The Maryland Court of Special Appeals affirmed petitioner's convictions. The court acknowledged that the theft statute covered "five different factual situations" ranging from obtaining property by deceit to knowing possession of stolen property (p. 10a, *infra*). Relying on two earlier Maryland decisions, the court concluded that all jurors need not agree which of the statutorily prohibited acts was committed, as long as the jurors "unanimously agree that theft in some form was committed, nothing more is required" (p. 11a, *infra*).

With respect to the trial judge's hostile examination of petitioner, the court below concluded that the questioning did not "reveal any display of partiality in the judge" (p. 33a, *infra*). Although the court acknowledged that it was improper for the judge to utilize a document not admitted into evidence and not produced by either party in examining petitioner, it held that the error was "harmless beyond a reasonable doubt" (p. 34a, *infra*). It arrived at this conclusion despite the fact that the jury sent a note to the trial judge specifically asking about this document (Tr. 11/25/86, p. 237).

REASONS FOR GRANTING THE WRIT

Petitioner is an attorney who, prior to the charges made in this case, enjoyed an outstanding reputation. He established a savings and loan association that operated conservatively for many years under his leadership. His misfortune was in selling control of that institution, at the suggestion of MSSIC, to an individual who operated it in a wholly different style that involved admitted violations of law and great risk to thousands of depositors.

Petitioner's sale of ownership—with its concomitant right to 50 percent of all closing costs—was approved by Maryland's governmental regulators. Nonetheless, petitioner's receipt of funds to which he believed he was contractually entitled became a sword used against him by state officials who were under great public pressure to take vengeance on anyone associated in an ownership capacity with Old Court Savings and Loan Association.⁵

The public passions engendered by Maryland's savings and loan crisis resulted in petitioner's indictment and conviction on ill-fitting "theft" charges. While public feelings were still high and despite petitioner's substantial showing of prejudice, the trial judge refused to delay petitioner's trial for even a few months. When the trial was held, the prosecution did not call Jeffrey Levitt—the individual who had knowingly and willingly authorized the payments that petitioner allegedly "stole"—even though Levitt had concluded a plea arrangement with the prosecutor and been sentenced for his crimes.

Petitioner voluntarily took the stand at his trial and explained that the payments made to him were funds to which he was entitled. After the prosecutor concluded his cross-examination, the trial judge undertook an adversarial interrogation, during which he used a document received from another judge and not offered as evidence in this case by any party. In so doing, the judge unconstitutionally exceeded the judicial role in a crim-

⁵ Before the indictment was returned, the then Attorney General conceded that his role in the underlying events was a live issue in his campaign for Governor (Defendant's Motion to Dismiss the Indictment and Disqualify the Office of the Attorney General, Exhibit 2). Petitioner moved to dismiss the indictment and to disqualify the Office of the Attorney General. He requested an evidentiary hearing to demonstrate that the Attorney General had a compelling personal motivation to prosecute petitioner and thereby make up for years of lax regulation of the savings and loan industry. The trial court denied petitioner's motion and refused to hold an evidentiary hearing (Tr. 9/29/86, pp. 66-77).

inal case and conveyed to the jury his disdain for the accused and for the theory of defense.

The final blow was the authorization to the jurors to choose whatever "form of theft" any juror believed might be applicable. By permitting jurors to find petitioner guilty even if they disagreed on which of three different versions of the offense had been committed, the trial judge undermined the constitutional protections afforded to criminal defendants in state courts by the Fourteenth Amendment.

I. A SUBSTANTIAL CONSTITUTIONAL ISSUE IS PRESENTED BY THE TRIAL JUDGE'S PARTISAN CROSS-EXAMINATION OF PETITIONER

The degree to which a trial judge may initiate an accusatory cross-examination of a defendant in a criminal trial is an issue that has recently divided federal and state courts. Federal courts have recognized that the impartiality of a trial judge is an essential component of the fairness that must constitutionally accompany criminal trials in state courts. *See, e.g., Gayle v. Scully*, 779 F.2d 802, 805-806 (2d Cir. 1985), *cert. denied*, 107 S. Ct. 139 (1986); *Walberg v. Israel*, 766 F.2d 1071, 1076-1078 (7th Cir.), *cert. denied*, 106 S. Ct. 546 (1985); *Anderson v. Warden*, 696 F.2d 296, 299 (4th Cir. 1982) (*en banc*), *cert. denied*, 462 U.S. 1111 (1983); *cf. Rose v. Clark*, 106 S. Ct. 3101, 3106 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). If a trial judge conveys to the jury his disbelief of the defendant or his personal rejection of the defendant's case, the criminal trial has been improperly skewed and the jury verdict is constitutionally defective.

This Court observed long ago that "under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, . . . and his lightest word or intimation is received with deference

and may prove controlling.” *Starr v. United States*, 153 U.S. 614, 626 (1894). On this account, courts have reversed convictions when trial judges have exceeded their proper judicial functions.

The decision of the court below is diametrically opposed to the rationale of two recent decisions of the Court of Appeals for the Second Circuit, which reversed federal convictions because the trial judges had conducted accusatory examinations of defendants. In *United States v. Victoria*, 837 F.2d 50 (2d Cir. 1988), a judge conducted interrogations that were similar to the interrogation conducted in this case by the trial judge. The Court of Appeals characterized the questioning of each defendant as “in the nature of cross-examination challenging the credibility of the witnesses.” 837 F.2d at 54. The Second Circuit reversed the convictions on the ground that the judge’s interrogations “served to convey to the jury here the judge’s opinion that the witness was not worthy of belief.” 837 F.2d at 55. In the *Victoria* case, as in this one, “credibility of a defendant-witness [was] a key issue.” *Id.*

The Second Circuit followed the same reasoning even more recently in *United States v. Mazzilli*, No. 87-1438 (2d Cir. June 6, 1988). In the *Mazzilli* case, as in this one, the defendant “relied almost exclusively on his own testimony at trial to rebut the government’s case” (slip op., p. 3646). And in *Mazzilli*, as in this case, the trial judge “imparted a message of skepticism to the jury” and “left the jury with the indelible impression that the court did not believe” the defendant (slip op., p. 3647).

We recognize that the recent *Victoria* and *Mazzilli* decisions involve federal court trials, where the supervisory authority of the federal courts of appeals controls, and not trials in the state courts where this Court’s authority extends only to constitutional violations. But the consequence of a judge’s partisan cross-examination of a

defendant whose credibility is the linchpin of his defense is the same in both situations—it deprives the defendant of a jury that has not been excessively influenced by comments or attitudes of the presiding judge. This is a necessary part of the right to a fair trial in both federal and state courts.

In this case, the trial judge tried to impeach petitioner's credibility by having him admit that the funds due from settlements should have been distributed to his law firm and not to him personally. At one climactic point in his cross-examination, after he had tried to trap petitioner into a damaging admission by mistakenly summarizing his testimony, the trial judge pointedly asked petitioner, "Would you tell us what you did testify to?" (p. 50a, *infra*). The prejudice caused by the judge's hostile interrogation was far more substantial than the passing remark made by a trial judge, at the inception of jury selection, that prompted two Justices of this Court to vote to grant certiorari in *Scott v. Ohio*, 107 S. Ct. 1386 (1987).

The prejudice caused petitioner in this case was aggravated by the document which the trial judge used during his cross-examination. The document was, as the court below acknowledged, a letter that was not in evidence. The jury's interest in that document was manifested when the foreman asked about examining the document (Tr. 11/25/88, p. 237). The request was, of course, denied because the document had not been offered or admitted. But its prejudicial impact was clearly demonstrated by the jury's inquiry. The judge's reference to the document must have communicated to the jury the message that the judge knew of evidence damaging to the petitioner beyond what the jury saw and heard.

II. THE REQUIREMENT OF AGREEMENT BY A SUBSTANTIAL MAJORITY OF THE JURY ON EACH ELEMENT OF A CRIMINAL VIOLATION IS AN IMPORTANT UNDECIDED CONSTITUTIONAL ISSUE

Federal and state courts have expressed strong disagreement over the degree to which jurors must agree on *all* the elements of a criminal violation. This Court recently said in *McMillan v. Pennsylvania*, 106 S. Ct. 2411, 2416 (1986), that the Due Process Clause requires that “the prosecution prove beyond a reasonable doubt all of the elements *included in the definition of the offense* with which the defendant is charged” (emphasis in original) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)). The Court has also held that the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, sets minimal standards as to the number of jurors who must participate in a criminal verdict. *E.g.*, *Burch v. Louisiana*, 441 U.S. 130 (1979). Yet the application of these principles has been different in various courts.⁶

At the one extreme is the decision of the court below, following two recent Maryland precedents—*Rice v. State*,

⁶ This Court has never explicitly held that the agreement of a substantial majority of jurors in a state case on each element of an offense is a necessary component of proof beyond a reasonable doubt or of the guarantee of a jury trial. But this conclusion is suggested by *Johnson v. Louisiana*, 406 U.S. 356 (1972); *id.* at 366 (Blackmun, J., concurring), and by this Court's repeated emphasis on group deliberation as a hallmark of the right to a jury trial. See *Burch v. Louisiana*, 441 U.S. at 135; *Williams v. Florida*, 399 U.S. 78, 100 (1970). Numerous state and federal courts have concluded that juror agreement effectuates the reasonable doubt standard as well as the guarantee of a jury trial in criminal cases. *E.g.*, *United States v. Gipson*, 553 F.2d 453, 457-59 & n.7 (5th Cir. 1977); *Scarborough v. United States*, 522 A.2d 869, 872 (D.C. App. 1987) (en banc); *State v. Lomagro*, 113 Wisc.2d 582, 591, 335 N.W.2d 583, 589 (1983); see generally Note, Right to Jury Unanimity on Material Fact Issues: *United States v. Gipson*, 91 Harv. L. Rev. 499, 505 (1977).

311 Md. 116, 532 A.2d 1357 (1987); and *Craddock v. State*, 64 Md. App. 269, 494 A.2d 971, *cert. denied*, 304 Md. 297, 498 A.2d 1184 (1985). As plainly stated in *Rice*, the Maryland courts hold that an accused may be convicted of theft if six jurors believe he stole property and six other jurors disagree, but nonetheless believe that he knowingly possessed stolen goods. See 311 Md. at 122, 532 A.2d at 1361.

That view squarely conflicts with rulings in various other jurisdictions. The leading precedent for the contrary view is Judge Wisdom's opinion for the Court of Appeals for the Fifth Circuit in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). In that case, the Court of Appeals held that a conviction under 18 U.S.C. § 2313, which relates to anyone who "receives, conceals, stores, barter, sells or disposes" of a motor vehicle, cannot stand if the jury could have disagreed over which category of acts the accused committed.

A number of federal and state courts follow the *Gipson* ruling. See, e.g., *United States v. Beros*, 833 F.2d 455, 459-463 (3d Cir. 1987); *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983) (Kennedy, J.); *United States v. Paysano*, 782 F.2d 832, 837 (9th Cir. 1986); *United States v. Balistrieri*, 779 F.2d 1191, 1224 (7th Cir. 1985); *United States v. Schiff*, 801 F.2d 108, 114-115 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987); *United States v. Mangieri*, 694 F.2d 1270, 1279-1280 (D.C. Cir. 1982); *Shivers v. United States*, 533 A.2d 258, 261 (D.C. App. 1987); *State v. Lo Sacco*, 11 Conn. App. 24, 525 A.2d 977, *certif. denied*, 204 Conn. 812, 528 A.2d 1158 (1987); *People v. Burgess*, 67 Mich. App. 214, 221-22, 240 N.W.2d 485, 488-89 (1976); *Jackson v. State*, 92 Wisc.2d 1, 9, 284 N.W.2d 685, 689-690 (1979).

Other federal and state courts, although nominally invoking *Gipson*, have, in one form or another, followed the path of the Maryland courts. These courts frequently conclude that jury agreement on operative facts set forth

in a criminal statute is not required if these facts constitute "means" by which an offense may be committed rather than an "element" of the offense. See, e.g., *United States v. Bouquett*, 820 F.2d 165, 168-169 (6th Cir. 1987); *United States v. Barton*, 731 F.2d 669, 672-673 (10th Cir. 1984); *People v. Marquez*, 692 P.2d 1089, 1099 & n.13 (Colo. 1984) (en banc); *State v. Wilson*, 220 Kan. 341, 344-45, 552 P.2d 931, 935-936 (1976); *Wells v. Commonwealth*, 561 S.W.2d 85, 87-88 (Ky. 1978); *Wilson v. State*, 637 P.2d 900, 902 (Okla. App. 1981); *State v. Russell*, 733 P.2d 162, 165-66 (Utah 1987); *State v. Franco*, 96 Wash.2d 816, 819-20, 639 P.2d 1320, 1322-23 (1982) (en banc).

The constitutional error in the jury instructions was compounded in this case by the Maryland court's view on appeal that because petitioner did not challenge the sufficiency of the evidence to support a conviction for theft by receipt of stolen property (Article 27, § 342(c)), it was irrelevant whether there was sufficient evidence to charge the jury on theft by unauthorized taking (§ 342(a)) or theft by deception (§ 342(b)). The court below said, "Because petitioner does not claim that the evidence was insufficient under subsection (c) of § 342, we will affirm" (p. 22a, *infra*). This holding conflicts with the rule in every jurisdiction, even those permitting a guilty verdict without complete jury agreement on the form of the offense. See, e.g., *United States v. Schiff*, 801 F.2d 108, 115 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987); *United States v. Mangieri*, 694 F.2d 1270, 1280-81 (D.C. Cir. 1982); *James v. People*, 727 P.2d 850 (Colo. 1986) (en banc); *State v. Russell*, 733 P.2d 162, 165 (Utah 1987); *Wells v. Commonwealth*, 561 S.W.2d 85, 88 (Ky. 1978); *State v. Arndt*, 12 Wash. App. 248, 252, 529 P.2d 887, 889 (1974), *aff'd*, 87 Wash.2d 374, 376, 553 P.2d 1328, 1330 (1976) (unanimity not required "if substantial evidence is presented to support each alternative method of committing a single

crime"). The Maryland court's holding is an invitation to dangle before juries alternate forms of statutory theft (or other comprehensive statutory offenses) for which there is no evidence, thereby confusing jurors and leading to unwarranted criminal convictions.

It is well established that a criminal conviction cannot stand if the jury's verdict could be supported on one ground but not on another, and the reviewing court cannot be certain which of the grounds was relied on by the jury. *E.g.*, *Mills v. Maryland*, No. 87-5367 (U.S. June 6, 1988), slip op., at p. 8; *Yates v. United States*, 354 U.S. 298, 312 (1957). In this case, various jurors—or, indeed, all jurors—may have found petitioner guilty of unauthorized taking of property under subsection (a) of Maryland's theft statute even though Levitt freely transferred title and possession to petitioner. This flaw is not corrected by the observation of the Maryland court that petitioner could also have exerted unauthorized control over property if he had knowingly received stolen property from Levitt. The court below merely recognized a theoretical possibility that subsections (a) and (c) "could" both cover receipt of stolen property. There is no reason to suppose, however, that those jurors voting to convict under subsection (a) based their verdict on this theory. If, under the judge's instructions, it was *possible* for the jury to return its verdict on a legal theory unsupported by the evidence, the convictions must be vacated.

CONCLUSION

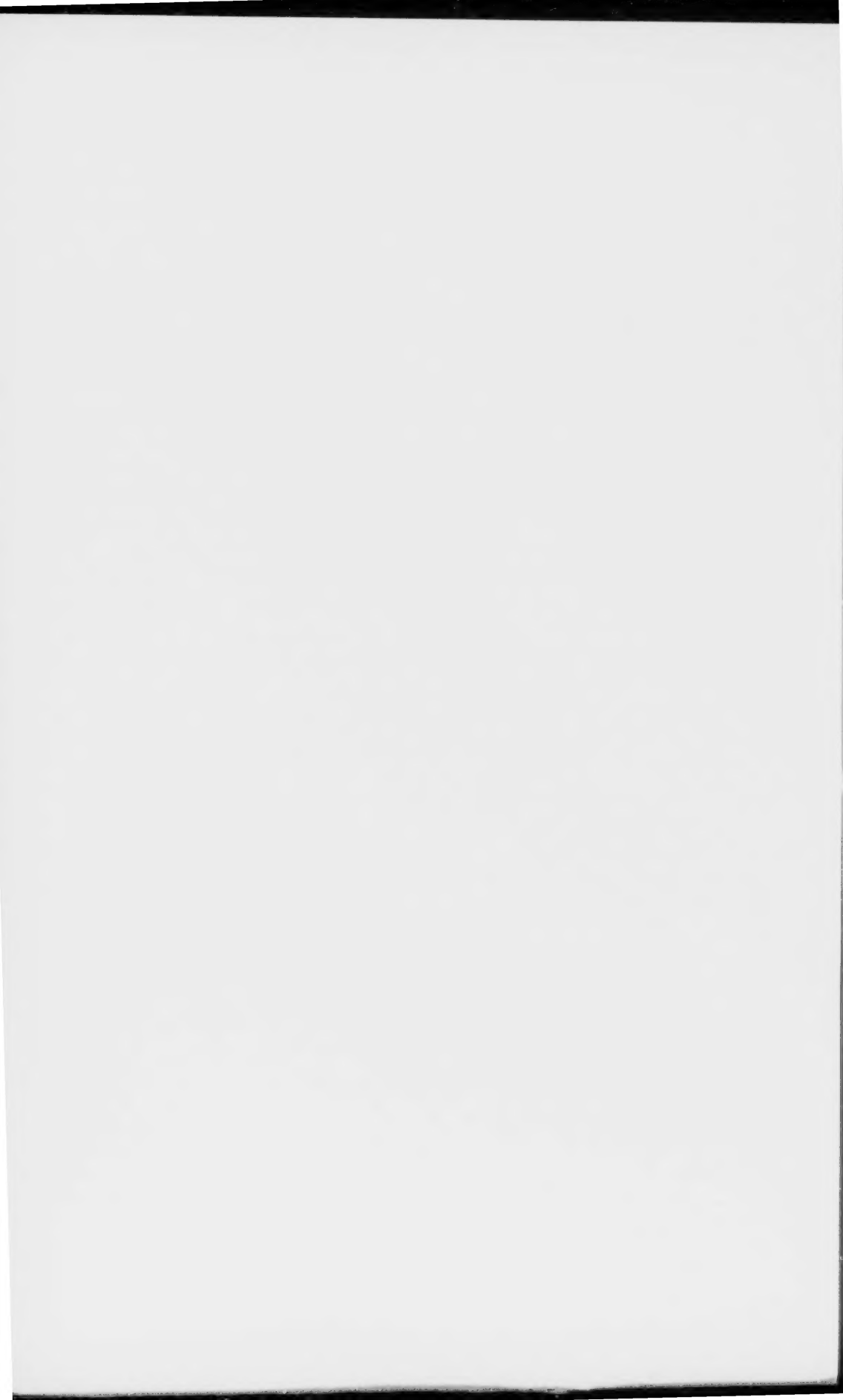
For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

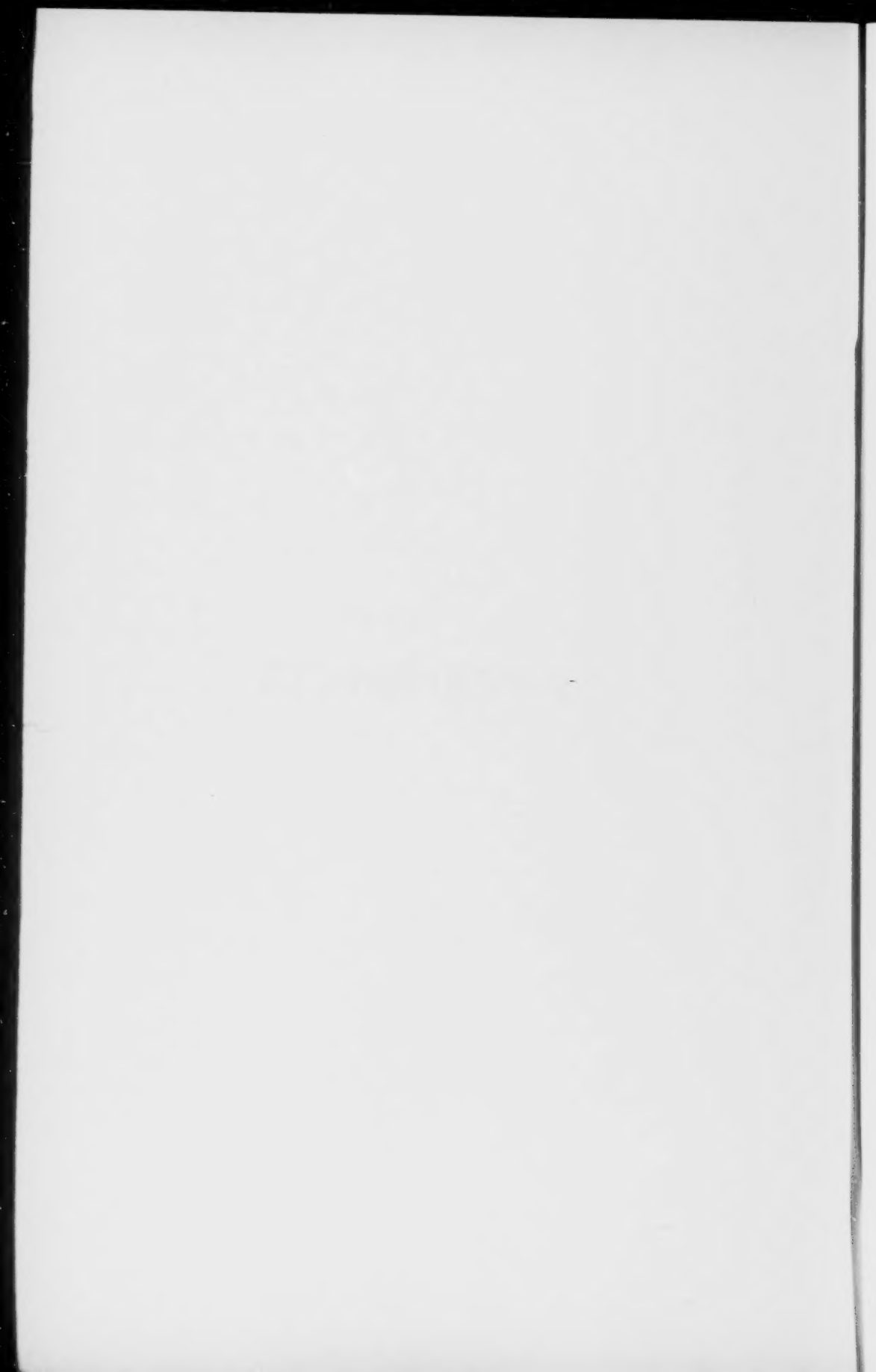
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June 1988



APPENDICES



1a

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 585

September Term, 1987

(No. 200, September Term, 1987
Court of Special Appeals)

JEROME S. CARDIN

v.

STATE OF MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers and conditional cross-petition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: March 28, 1988

APPENDIX B

COURT OF SPECIAL APPEALS OF MARYLAND

No. 200, Sept. Term, 1987

JEROME S. CARDIN

v.

STATE OF MARYLAND

Dec. 2, 1987

Aubrey M. Daniel, III (John K. Villa, Gerson A. Zweifach, Stephen D. Raber and Williams & Connolly, on brief), Washington, D.C., George L. Russell, Jr. (Russell & Thompson, on brief), Baltimore, for appellant.

Dale P. Kelberman, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., Charles O. Monk, II, Deputy Atty. Gen. and Peter E. Keith, Asst. Atty. Gen., on brief), Baltimore, for appellee.

Argued before WEANT, GARRITY and BLOOM, JJ.

BLOOM, Judge.

A jury in the Circuit Court for Baltimore City convicted appellant, Jerome S. Cardin, of five counts of theft under Maryland's consolidated theft statute, Maryland Code Annotated, art. 27, § 342 (1957, 1982 Repl. Vol.). Appellant was sentenced to five concurrent fifteen year terms of imprisonment. In this appeal he makes numerous assertions of error with regard to the sufficiency

of evidence, the jury instructions and the conduct of both the State and the trial court during *voir dire*, during the trial, and during closing arguments.

Finding no reversible error, we affirm the judgments of the circuit court.

Facts

Jerome Cardin, a native of Baltimore City, was, at the time of trial, a 60-year-old attorney and businessman. He had formed Old Court Savings and Loan Association ("Old Court") as a stock savings and loan association¹ in 1959. Under Cardin's control, Old Court was a conservatively run institution. Even though Old Court generated no dividends for its shareholders, it was profitable until the late 1970's. In 1979, however, Old Court began to fail, primarily as a result of rapidly rising interest rates, and by August 1982 it had a negative net worth. The Maryland Savings Share Insurance Corporation ("MSSIC"), a private insurance authority that participated with the State in regulating the savings and loan industry, advised Old Court to seek an injection of fresh capital through a merger or sale of the association.

At MSSIC's direction, Cardin began negotiations to sell Old Court or to merge it with a stronger institution. In September 1982, MSSIC's executive vice president introduced Cardin to prospective buyers, Jeffrey Levitt and Allan Pearlstein. Cardin, Levitt and Pearlstein eventually entered into a written agreement ("the sale agreement") whereby Cardin sold controlling interests in the institution to Levitt and Pearlstein, retaining only an 18% ownership interest in Old Court.

¹ In a *stock* savings and loan association, the corporation's owners own all the assets except for the accounts funded by the depositors. In contrast, in a *mutual* savings and loan association, all the assets are owned by the association's depositors.

As part of the sale, Cardin negotiated a five year agreement retaining his law firm, Cardin and Cardin, P.A., as counsel to Old Court at an annual retainer of \$40,000 plus hours billed in excess of that amount. The sale agreement also provided for the firm of Cardin and Cardin, P.A., to perform legal services in connection with Old Court loan closings ("the loan closing agreement"). In exchange for those legal services, Cardin and Cardin, P.A., or its designee would receive 50% of the closing fees charged by attorneys handling Old Court's loan settlements.

MSSIC approved the sale agreement in its entirety. The loan closing agreement, however, did not operate as it had been represented to MSSIC. The role of Cardin and Cardin, P.A. in loan closings progressively diminished over time; by the summer of 1984 the law firm was providing no legal services whatsoever in connection with Old Court's loan closings. Cardin testified that the loan closing agreement degenerated to a "fee splitting agreement" in that Cardin & Cardin, P.A., continued to receive 50% of all fees generated by Old Court in connection with loan closings even after that law firm ceased to perform the legal services contemplated by the loan closing agreement. Old Court borrowers were not informed that Cardin, who performed no legal services in connection with their loans, received 50% of the closing fees collected at Old Court loan settlements.

Jeffrey Levitt paid Cardin & Cardin, P.A. its "settlement fees" under the fee splitting agreement from his personal expense account at Union Trust Co. Bank. Between December 1983 and May 1985, Levitt wrote twelve checks, in the total amount of \$1,040,000.00, to Cardin pursuant to the fee splitting agreement.

As early as the summer of 1983, attorneys at Cardin & Cardin, including Jerome Cardin's son, Sanford, became concerned that the fee splitting agreement might

violate the Code of Professional Responsibility's prohibition against unethical fee splitting.² Cardin testified that in the fall of 1983, in response to this concern, he and Levitt entered into two agreements retaining Cardin & Cardin, P.A., as general counsel for Levitt and for Charles Street Title, Inc. (one of Levitt's companies), respectively.

Each agreement provided for Cardin & Cardin, P.A., to receive \$6,000.00 per month. Cardin testified that the legal services to be performed consisted of being "available to furnish general legal advice as requested by Jeffrey Levitt on the one hand and Charles Street Title on the other." The monthly retainer fees were increased to \$7,000, then to \$8,000, and finally to \$9,000 per month.

Cardin explained that he would deduct from the amounts owed pursuant to the fee splitting agreement the amounts received pursuant to the Levitt and Charles Street Title retainers. The fees received pursuant to the Levitt and Charles Street Title retainers brought Cardin's total Old Court earnings far above the \$1,040,000 received from Levitt pursuant to the fee splitting agreement.

Meanwhile, between the 1982 sale of Old Court and its collapse in 1985, Cardin continued to be involved in Old Court's management. Cardin, Levitt and Pearlstein attempted to meet at least weekly to discuss Old Court's current and future business. Cardin and Levitt joined

² Disciplinary Rule 2-107 provides,

[Section] A: A lawyer shall not divide a fee for legal services with another lawyer who is not a partner or associate of his law firm or law office unless, one, the client consents to employment of the other lawyer after full disclosure that a division of fees will be made; two, the division is made in proportion to the services performed and responsibility assumed by each; three, the total fees of the lawyers does not clearly exceed reasonable compensation for legal services they rendered the client.

in a number of business and real estate ventures financed through Old Court. On at least two occasions, Cardin sent memos to Levitt, warning Levitt of "the importance of Old Court's strict compliance with all regulations" and preaching that "no matter how big one is, it is imperative that he comply with the letter of the law" and that "perception is more important than fact." Prophetically, Cardin attached to one of his warning memos a 14 November 1984 *Wall Street Journal* article concerning the indictment of a former bank chief executive officer on 44 counts of bank fraud.

From the fall of 1982 through May 1985, when Old Court collapsed and was placed into conservatorship by the state, Cardin & Cardin, P.A., received \$1.3 million for "legal services" rendered to Old Court over and above the \$1,040,000 it received pursuant to the fee splitting agreement. In addition to those sums, Cardin was paid a total of \$385,000 in five separate transactions, for which he was indicted and convicted in this case.

The five counts of theft were as follows:

Count I: Count I charged Cardin with stealing \$100,000 in connection with a project known as "Bloody Point." The state produced evidence from which the jury found that, in October and November of 1984, two real estate developers obtained a \$6.5 million loan from Old Court Savings and Loan to purchase and eventually develop property known as Bloody Point. The loan proceeds in excess of the purchase price were placed in escrow to be withdrawn as needed. Cardin admittedly had no involvement whatsoever with Bloody Point; nevertheless he submitted to Jeffrey Levitt an invoice on the letterhead of Cargol Consultants, Inc. ("Cargol") for "services rendered" in the amount of \$100,000.00. Cargol, a shell corporation formed and controlled by Cardin, had rendered no services. At the time of settlement, Levitt drew a check to Cargol for \$100,000.00 as part of the distribu-

tion of the \$6.5 million loan proceeds. The jury convicted Cardin of theft of the \$100,000.00, which would otherwise have remained in escrow at Old Court for use by the developers. In so doing, the jury rejected Cardin's defense that the \$100,000.00 actually represented his rightful share of the closing fees and that Cargol was merely the "designated payee" pursuant to the fee splitting agreement.

Counts II and III: Counts II and III concerned two checks, each for \$75,000, which Cardin received in February of 1985. One check was drawn on the account of Old Court Joint Venture (OCJV), the other on the account of Old Court Investment Corporation, Inc. (OCIC). Both OCJV and OCIC were wholly owned subsidiaries of Old Court. Cardin had submitted to OCJV and to OCIC invoices on Cargol letterhead, in the amount of \$75,000 each, for services rendered. At trial, Cardin admitted that Cargol rendered no services for OCIC or OCJV, and that the invoices were "inaccurate." In convicting Cardin of theft in connection with each of those transactions, the jury rejected Cardin's defense that the two \$75,000 payments were actually "bonuses" representing Cardin's rightful 18% share of Old Court's recent profits. Cardin admitted that he knew that Old Court's Board of Directors never approved such a distribution of profits, and he also conceded that under Maryland Code Ann. Financial Institutions article § 9-328 (1986 Repl. Vol.), a saving and loan's board of directors must approve the distribution of any profits. It is interesting to note that Cardin testified that he served on the committee that promulgated the current Financial Institutions Code.

Count IV: Count IV involved a project known as "Galleria Enterprises of Maryland" (Galleria). Galleria's owners borrowed \$300,000 from Old Court and deposited the money into an account opened in Galleria's name. Cardin submitted two invoices to Galleria on May 1,

1984, and July 18, 1984, on his personal stationery. Each of those invoices requested payment "for consultation services" in the amount of \$25,000. Admitting that no services were performed for Galleria and that the invoices were "inaccurate," Cardin claimed the \$50,000 paid from the Galleria escrow account at Old Court represented closing fees rightfully due him pursuant to the fee splitting agreement. The State, however, produced evidence that the checks were not drawn on Levitt's personal account as was the regular practice pursuant to the fee-splitting agreement. The jury convicted Cardin of stealing \$50,000 of Galleria's money.

Count V: Count V involved one payment to Cardin of \$85,000 by check drawn on an Old Court account in the name of "Variety Services, Inc." Unlike the other sums for which Cardin was convicted, this payment was not made pursuant to a false invoice. The check, however, bore the notation "legal consult." Cardin testified that he had never heard of Variety Services, Inc. and that he performed no legal services for Variety. The State presented considerable evidence that tended to prove that by the time Cardin received the \$85,000 payment in May 1985, he knew that the money he received had been stolen by Levitt. Cardin asserted that the \$85,000 payment represented payment due him pursuant to the fee splitting agreement with Levitt and Pearlstein, but the check was not drawn on Levitt's personal account at Union Trust as had been Levitt's usual method of dispersing payments due pursuant to the fee splitting agreement. It was the State's theory that Cardin was guilty of theft because he knew he was receiving stolen money. The jury apparently accepted that theory; it convicted Cardin of theft of the \$85,000.

Appellant's Contentions

With regard to the jury instructions, Cardin claims the following instructions were erroneous:

-that the jury need not agree on which form of theft was committed;

-that any conduct by the defendant related to his receipt and handling of money which was likely to mislead or conceal was relevant to the question of intent;

-that if the jury found Cardin had engaged in fee splitting which violated Disciplinary Rule 2-107, that fact could be considered in deciding whether the defendant had criminal intent in receiving the funds alleged to be stolen;

-that under Maryland law, dividends can be declared only on an annual basis.

Cardin also asserts the trial judge erred in refusing to instruct the jury on the *definitions* of his "claim of right" and "honest belief" defenses, and in refusing to instruct the jury that "evidence of good character . . . 'is not proof of innocence although it may be sufficient to raise a doubt of guilt.'"

With regard to the evidence produced at trial, Cardin complains that the State failed to prove the essential elements of "obtaining or exerting unauthorized control over the property of another" and "theft by deception," two of the types of theft prohibited under Maryland's comprehensive theft statute.

Finally, with regard to the conduct of the trial itself, Cardin claims that the trial court impermissibly limited the scope of *voir dire*, erred in refusing to dismiss a juror for cause, impermissibly cross-examined Cardin and impermissibly permitted the State to present an inflammatory closing argument.

We shall address each of those contentions in turn.

I

In instructing the jury, the trial judge said, *inter alia*:

"All that is required is that all members of you, the jury, are convinced beyond a reasonable doubt that all elements of one or more forms of theft have been proven."

Cardin contends that this instruction was erroneous because, under Maryland's consolidated theft statute, Md. Code Ann. art. 27, § 342 (1957, 1982 Repl. Vol.), the jury must unanimously agree upon which *form* of theft was committed in order to convict.

Cardin's contention is without merit. As we recently stated in *Craddock v. State*, 64 Md.App. 269, 494 A.2d 971, *cert. denied*, 304 Md. 297, 498 A.2d 1184 (1985):

Article 27, Sec. 342 sets forth five different factual situations which, if proved, constitute the crime of theft. The categories are:

- (a) Obtaining or exerting unauthorized control over property of the owner.
- (b) Obtaining control over property of the owner by deception.
- (c) Possessing stolen personal property knowing that it has been stolen, or knowing that it probably has been stolen.
- (d) Obtaining control over the property of another knowing that it is lost or mislaid property.
- (e) Obtaining the services of another by deception, or knowing that the services are provided without the consent of the person providing them.

Clearly, the gravamen of the offense of theft is the depriving of the owner of his rightful possession of

his property. The particular method employed by the wrongdoer is not material; "an accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this subheading" Art. 27, Sec. 341; *Whitehead v. State*, 54 Md.App. 428 at 442, 458 A.2d 905 (1983). See *Jones v. State*, 303 Md. 323, 493 A.2d 1062 (1985).

Generally, jurors are not required to uniformly accept all of the evidence presented in order to arrive at a unanimous verdict. Some jurors unquestionably reject evidence that others accept in determining guilt or innocence. In short, the law requires unanimity only in the verdict, not in the rationale upon which the verdict is based. In the case *sub judice*, the statute sets forth various acts that constitute the crime of theft. As long as jurors unanimously agree that theft in some form was committed, nothing more is required.

Id. at 277-78, 494 A.2d 971.

Even more recently, the Court of Appeals had occasion to address the same issue in a slightly different context. In *Rice v. State*, 311 Md. 116, 532 A.2d 1357 (1987), the evidence would have supported a conviction of theft under either subsection (a) of art. 27, § 342, "Obtaining or exerting unauthorized control," or subsection (c), "Possession of stolen property." The appellant contended that the trial judge erred in refusing to grant an instruction to the effect that, in order to convict, the jury must be unanimously agreed on all elements of at least one subsection of the statute. Rejecting that contention, the Court held that the unanimity sought by appellant is not constitutionally required because subsection (a) and subsection (c) "are not autonomous offenses but rather one crime defined two ways." 311 Md. at 136, 532 A.2d 1357.

II

The court also instructed the jury as follows:

"Any conduct by a defendant related to his receipt and handling of money which was likely to mislead or conceal is relevant to the question of intent."

"You have heard evidence that certain conduct of the defendant may be unethical fee splitting in violation of Disciplinary Rule 2-107 of the Maryland Code of Professional Responsibility for attorneys. . . .

"A violation of Disciplinary Rule 2-107 is not a crime in and of itself. However, if you conclude that the defendant's conduct violated Disciplinary Rule 2-107, you may consider that evidence as relevant to the defendant's intent, the defendant's good character or lack thereof, the defendant's knowledge of the conduct of Jeffrey Levitt when the defendant received funds from Mr. Levitt, and whether the defendant had a good faith honest belief that he was entitled to the monies he received."

Cardin argues that the two instructions quoted above were erroneous because they were "grossly prejudicial" and because they were "unprecedented" under Maryland law. We do not agree, and find that the trial judge correctly instructed the jury.

Cardin's defense to each charge of theft was that he entertained a good faith belief that he was entitled to the money. The challenged instructions addressed the jury's determination of Cardin's state of mind, and, as Lord Bowen noted in *Edgington v. Fitzmaurice*, 29 Ch.D. 459, 483 (1885), the state of a man's mind is as much a matter of fact as the state of his digestion. In *Weaver v. State*, 226 Md. 431, 174 A.2d 76 (1961), the Court of Appeals stated:

The state of one's mind or *scienter* is a question of fact. *Putinski v. State*, *supra* [223 Md. 1, 161 A.2d 117 (1960)]; *Tufts v. Poore*, 219 Md. 1, 147 A.2d 717. And being subjective in nature, proof of wrongful intent is seldom direct, but is usually inferred from proven circumstances. *Felkner v. State*, 218 Md. 300, 146 A.2d 424.

Id. at 434, 174 A.2d 76 (*quoted in Caldwell v. State*, 26 Md.App. 94, 108, 337 A.2d 476 (1975)). In *Caldwell*, *supra*, we further explained that "[t]he 'proven circumstances' for which an accused's state of mind or intent can be inferred are his acts, conduct and words." *Id.* at 108, 337 A.2d 476 (citations omitted); *see also Taylor v. State*, 238 Md. 424, 433, 209 A.2d 595 (1965). Prior crimes or bad acts may be considered by the jury in their determination of a defendant's intent. *Tinnen v. State*, 67 Md.App. 93, 98, 506 A.2d 656 (1986). "Moreover, 'other crimes' evidence may be admitted when several crimes are so connected in time or circumstances that one cannot be fully shown without proving the other." *Id.* at 98, 506 A.2d 656 (citations omitted).

We feel that the instructions with regard to Cardin's "receipt and handling of money" were correct. Cardin testified that he arranged for Cargol to receive funds which were actually paid to him. Cardin testified that he formed and utilized Cargol, a shell corporation, purely for tax purposes. Cardin claimed that his use of Cargol evidenced his good faith, honest belief defense that he had the right to exert control over the funds received as he did. The State, on the other hand, contended that Cardin's use of Cargol's name in submitting false invoices evidenced Cardin's intent to deceive bank regulators and to launder funds he knowingly stole from Old Court's depositors. In view of the conflicting inferences as to Cardin's intent or state of mind in submitting bills and receiving money through Cargol, the court's instruction concerning Cardin's "receipt and handling of

money" was proper. Cardin was free to argue, as he did, that his use of Cargol as a conduit was not intended to and did not mislead or conceal; the State, in turn, was free to interpret Cardin's use of Cargol as proof of criminal intent. *Hayette v. State*, 199 Md. 140, 145, 85 A.2d 790 (1952).

We also believe that the court's instruction with regard to the possible Disciplinary Code violation was correct and warranted by the evidence. Cardin himself stated that he engaged in a fee-splitting arrangement with the other Old Court owners. Cardin also testified that his associates at Cardin & Cardin, P.A., expressed their concern that the fee-splitting arrangement violated the disciplinary rules, but subsequently researched the problem and concluded that the fee-splitting agreement did not amount to a violation. Cardin claimed that the fee splitting agreement, and his belief that the practice was ethical, evidenced his good faith claim of right to the funds he was accused of stealing in Counts I, IV and V.

Cardin requested an instruction that "[u]nder certain circumstances fee splitting may violate the lawyer's professional code, but it is not a violation of law and not a criminal act." The given instruction—"A violation of Disciplinary Rule 2-107 is not a crime in and of itself"—fairly covered the instructions requested. The remainder of the instruction was also correct. Cardin introduced evidence of the fee-splitting agreement and its possible violation of the disciplinary rule as evidence of his "good faith claim of right" defense, *i.e.*, his belief that he was entitled to the money paid to him. It was entirely proper for the jury to consider whether a fee splitting arrangement that would violate the canons of ethics governing Cardin's profession was consistent with a bona fide belief that he was entitled to the money.

In *United States v. Reamer*, 589 F.2d 769 (4th Cir. 1978), in a criminal trial for mail fraud arising from

charges of operating a scheme to defraud insurance companies, the Fourth Circuit Court of Appeals affirmed the lower court's instruction that if the jury concluded that the defendant violated a disciplinary rule in connection with the scheme to defraud insurance companies, the jury could consider such violation in their determination of defendant's intent to engage in mail fraud. *Id.* at 771. In *United States v. Klauber*, 611 F.2d 512 (4th Cir. 1979), in a criminal trial for mail fraud and racketeering, the Fourth Circuit Court of Appeals approved the following instructions:

The Government has introduced evidence which it claims shows that the defendant paid individuals known as runners and MTA bus drivers moneys in exchange for those individuals referring to him clients who had been injured in automobile and bus accidents. The use of such individuals is relevant in this case if you find that the procurement of clients by such persons was part of the scheme as alleged in the indictment.

The law of the State of Maryland prohibits an attorney from compensating or agreeing to compensate another person for procuring clients. Furthermore, the Code of Professional Responsibility which applies to attorneys practicing in the State of Maryland provides in part as follows:

A lawyer should not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client. Likewise, a lawyer shall not accept employment when he knows or it is obvious that the person who seeks his service does so as a result of conduct described herein.

If you should find that as a part of a scheme to defraud, the defendant paid certain individuals for the

purpose of procuring as clients persons who had been involved in automobile and bus accidents, and if you should further find that the defendant knew or should have known that such payments were violations of Maryland law or violations of the Code of Professional Responsibility applicable to Maryland lawyers, then you may consider such violation as evidence of the intent with which the defendant acted in this case.

The Maryland Court of Appeals found it necessary to analyze those instructions in the disciplinary proceedings that followed Klauber's conviction, in order to determine whether the crime of mail fraud was necessarily one involving moral turpitude. The Court concluded that it was not. *Attorney Grievance Committee v. Klauber*, 283 Md. 597, 598-99, 391 A.2d 849 (1978). Concurring with that result, Judge Gilbert specifically criticized the *Klauber* instruction as follows:

Plainly, the hiring of "runners," while a clear violation of the Canons of Professional Responsibility, Md. Rule 1230, is not a crime involving moral turpitude. *Under that charge, if the jury believed the government's case was weak, they may well have considered the employment of "runners" as evidence of fraudulent intent and thereby bootstrapped the government's case to a strength it otherwise would not possess.* Of course, I do not know that this is what happened, but as the majority makes clear, it *could* have happened, and that is enough to preclude a finding that "the crimes of which . . . [Klauber] was convicted plainly involved moral turpitude." *Attorney Grievance Commission v. Reamer*, 281 Md. [323] at 328 [379 A.2d 171 (1977)].

I cannot, with any degree of reasonable certainty, state that the portion of the District Court judge's

charge dealing with the “runners” had no effect on the jury’s verdict.

Id. at 602, 391 A.2d 849 (Gilbert, J., specially assigned, concurring) (emphasis added). In view of the concern expressed by Judge Gilbert in *Klauber*, we specifically limit our holding to the facts of this case—where the defendant introduces evidence of possible Disciplinary Code violations as evidence of a good faith or honest belief defense, whether a violation in fact occurred is relevant to the jury’s determination of the defendant’s intent or lack thereof. The instructions therefore were correct.

Appellant also contends that it was error for the trial judge to instruct the jury that:

“[A]t all times relevant to the issues in this case, Section 9-328 of the Financial Institutions Article of the Annotated Code of Maryland provides: ‘The Board of Directors of any savings and loan association shall allocate the profits of the association, at least annually, at the times the by-laws provide.’”

In Counts II and III, Cardin claimed that the \$75,000 payments from OCJV and OCIC to Cargol represented payment from Old Court to Cardin of profits to which Cardin was entitled as an owner of Old Court. Cardin’s knowledge of the above-quoted statute was admitted into evidence without objection; indeed, Cardin testified that he served on the committee that drafted § 9-328.

Cardin asserts that the instruction was erroneous because “§ 9-328 governs the allocation of accumulated profits to reserve accounts (which must be done annually)—a pure accounting function.” That contention is without merit. Section 9-328 identifies who must authorize payments of profits, a key issue in determining whether Cardin believed he had a legitimate right to exercise control over the \$150,000 in Counts II and III, and whether he in fact honestly believed he was entitled

to his share of Old Court's profits in the form of payments from OCJV and OCIC. Inclusion of a pertinent statute in the trial court's advisory instruction is of course proper. *Dillon v. State*, 27 Md.App. 579, 588, 342 A.2d 677 (1975), *aff'd*, 277 Md. 571, 357 A.2d 360 (1976); *Parker v. State*, 7 Md.App. 167, 184-86, 254 A.2d 381 (1969), *cert. denied*, *Parker v. Maryland*, 402 U.S. 984, 29 L.Ed.2d 150, 91 S.Ct. 1670 (1971). There was no error here.

III

Evidence of good character . . . "is not proof of innocence although it may be sufficient to raise a doubt of guilt."

Cardin claims that under *Hennessy v. State*, 37 Md. App. 559, 378 A.2d 205, *cert. denied*, 281 Md. 738 (1977), he was entitled to the above-quoted instruction. We do not agree.

We did state in *Hennessy* that the above-quoted instructions were "as far as we will go." *Id.* at 566, 378 A.2d 205. Relying on that statement, Cardin requested the above instruction, but the trial judge denied the request and instead instructed the jury as follows:

The defendant has introduced evidence as to his good character in the community wherein he resides. The defendant has a right to do this in order to show that his character is such that it would make it unlikely that he would commit a crime such as the one with which he is charged. The prosecution may attempt to impeach the reputation of the defendant by offering evidence to rebut it or to show acts inconsistent with the character trait asserted by the defendant.

You should consider that evidence along with all the other evidence in this case in determining the guilt or innocence of the defendant.

We believe the gist of the instruction Cardin requested was fully covered in the instructions eventually given. The judge stated that character evidence may be presented to show that it is "... unlikely that [the defendant] would commit a crime such as the one with which he is charged." The phrase "unlikely that he would commit" conveys basically the same idea as "raise a doubt of guilt," since a determination that it is *unlikely* that the defendant committed the crime necessarily means that there is a *reasonable doubt* that the defendant is guilty as charged. It is clearly the law in Maryland that "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Md. Rule 4-325(c). See, *Lansdowne v. State*, 287 Md. 232, 239, 412 A.2d 88 (1980); *King v. State*, 36 Md.App. 124, 136, 373 A.2d 292, *cert. denied*, 281 Md. 740 (1977). Since the instructions actually given fairly covered the instructions requested, the trial judge did not abuse his discretion in refusing Cardin's requested character instruction.

IV

The trial judge refused to give instructions requested by Cardin defining two statutory defenses: "good faith claim of right," Md. Ann. Code art. 27, § 343(c)(1) (1982 Repl. Vol.), and "honest belief," Md. Ann. Code art. 27, § 343(c)(2) (1982 Repl. Vol.). Instead of giving the instruction submitted by Cardin, the trial judge instructed the jury on these defenses by reading verbatim the language of art. 27, § 343(c). We believe that was sufficient; the statutory language was not so technical or complicated as to confuse the jury, but instead was quite straightforward and lucid. It is well-established that "[w]hen the meaning of a charge is implicit and clear, definitive terms are discretionary." *Dillon v. State*, *supra*, 27 Md.App. at 586, 342 A.2d 677; *White v. State*, 23 Md.App. 151, 164, 326 A.2d 219 (1974), *cert. denied*, 273 Md. 723 (1975). Hence, the trial judge was clearly

within his discretion when he refused to define the requested terms.

V

Cardin claims that, under the theft statute, the evidence presented at trial was insufficient to convict him of "obtaining or exerting unauthorized control," art. 27, § 342(a),³ or of "obtaining control by deception," art. 27, § 342(b).⁴ With regard to the "unauthorized control" charge, Cardin claims that the State failed to prove that he exercised unauthorized control over the funds in question "because the evidence showed that in each instance at issue, the person who controlled the funds—Jeffrey Levitt—freely and voluntarily transmitted title *and* pos-

³ Md. Ann. Code art. 27, § 342(a) provides:

(a) *Obtaining or exerting unauthorized control.*—A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner, and

(1) Has the purpose of depriving the owner of the property;
or

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

⁴ Md. Ann. Code, art. 27, § 342(b) (1957, 1984 Repl. Vol.) provides:

(b) *Obtaining control by deception.*—A person commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control over property of the owner, and;

(1) Has the purpose of depriving the owner of the property;
or

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

session to Cardin." With regard to the "theft by deception" charge, Cardin claims that the State failed to prove "that the victim relied on a false representation to his detriment." Both arguments are without merit.

In *Lane v. State*, 60 Md.App. 412, 483 A.2d 369 (1984), *cert. denied*, 302 Md. 570, 489 A.2d 1129 (1985), we outlined the standard of appellate review of a claim that evidence produced at trial was insufficient to sustain a conviction under Maryland's theft statute:

Appellant's conviction must be affirmed if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Tichnell v. State*, 287 Md. 695, 717, 415 A.2d 830 (1980). The legislature revised the theft laws in 1979 in order to create a "single consolidated offense designated as 'theft' The purpose of this revision [was] to eliminate [the] technical and absurd distinctions that have plagued the larceny related offenses and produced a plethora of special provisions." *Joint Subcommittee on Theft Related Offenses, Revision of Maryland Theft Laws and Bad Check Laws*, p. 2 (October, 1978). Under the new law "[c]onduct designated as theft . . . constitutes a single crime embracing, among others, the separate crimes heretofore known as larceny, larceny by trick, larceny after trust, embezzlement, false pretenses, shoplifting and receiving stolen property." Md. Ann. Code 1957, art. 27, § 341 (1982 Repl. Vol.). . . . If the evidence against appellant was sufficient to prove theft under *any* subsection of § 342, the court may affirm.

Id. at 419-20, 483 A.2d 369 [citations omitted, second emphasis added].

Appellant does not claim on appeal that the evidence was insufficient for the jury to convict him of theft by receipt of stolen property, which the State also accused Cardin of committing. The State informed Cardin in its statement of particulars that in each count Cardin was charged with committing theft in violation of art. 27, § 342(a), (b) or (c). Because Cardin does not claim that the evidence was insufficient under subsection (c) of § 342,⁵ we will affirm. *Lane v. State, supra*, at 420, 483 A.2d 369.

We note that theft by "unauthorized control" (subsection (a)), theft by "deception" (subsection (b)), and theft by "possession of stolen property" (subsection (c)) are all included in the § 342 prohibition of theft in any form and by any means. Because the "unauthorized control" subsection "... makes no distinction concerning the way the property was obtained, it could be used to prosecute instances of 'receiving stolen property.'" *Joint Subcommittee on Theft Related Offenses, Theft and Bad Check Laws*, p. 35 (1979). The sufficiency of the evidence to support Cardin's conviction under art. 27, § 342 (c) has not been challenged, and if the evidence was sufficient to convict him under that subsection, it was sufficient to convict him under subsection (a) as well.

⁵ Md.Code Ann., art. 27, § 342(c) (1957, 1984 Repl.Vol.) provides:

(c) *Possession of stolen property.*—(1) A person commits the offense of theft if he possesses stolen personal property knowing that it has been stolen, or believing that it has probably been stolen, and:

(i) Has the purpose of depriving the owner of the property; or

(ii) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(iii) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

Finally, we do not interpret Maryland's consolidated theft statute as requiring detrimental reliance as an element of the crime. Both the plain language of the statute and its legislative history conclusively demonstrate that detrimental reliance on the part of the victim is not an element of theft by deception.

The language of the statute is neither obscure nor ambiguous. Article 27, § 342(b) provides: "A person commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control of the property of the owner. . . ." [Emphasis added.] "Deception" is defined in art. 27, § 340(b)(1) as follows: "[c]reate or confirm in another an impression which is false and which the *offender* does not believe to be true. . . ." [Emphasis added.]

There is nothing in the language of the statute that would require the State to prove that the victim relied to his detriment on any false representation. The plain meaning of the statute is reinforced by the fact that definition of "deception" requires only that the false statement and representation be known to be false by the "offender." The statute, therefore, requires proof of the offender's intent to mislead, not proof that the victim was misled.

The legislative history of § 342(b) confirms that the legislature purposely omitted detrimental reliance as an element of theft by deception. Maryland's theft law was enacted through a two-step process. The General Assembly originally proposed a consolidated theft statute in 1978 as Chapter 840 of the Laws of Maryland, but provided for a one-year delay in the enactment of the statute to permit comment and suggestions to improve the legislation. See, *Report of Joint Subcommittee on Theft Related Offenses, Revision of Maryland's Theft Laws and Bad Check Laws* (1979) at 2-3.

As initially adopted in 1978, § 342(b) provided: "A person commits the offense of theft when he willfully or

knowingly obtains by deception control over property of the owner." 1978 Md. Laws, Ch. 849, § 1. In response to a request for comments on the proposed statute, the Maryland Attorney General's Office suggested in a letter dated February 15, 1979, that the phrase "obtains by deception" be changed to "uses deception to obtain." The articulated purpose for this change was to eliminate any requirement, suggested by the phrase "obtains by deception," that the victim rely to his detriment, because "the defendant's criminality should not depend on what the victim is thinking." The State also wished "to give the statute the flexibility necessary to tackle sophisticated white collar prosecutions."

The Joint Subcommittee on Theft Related Offenses prepared a revised statute for consideration by the General Assembly, specifically incorporating the change in § 342 (b) suggested by the Attorney General. The Joint Subcommittee clarified the statute expressly to ensure that reliance by the victim was not an element of the offense. It is explained:

4. "Theft by deception"—Language was clarified to provide that the deception used by the thief need not be successful in misleading the "victim." It is only necessary that some form of deception be used and that the property be obtained. Therefore, if deception is used by a thief in dealing with an "undercover" agent and the agent is not deceived, but the property is obtained, the theft by deception will have been committed.

Excerpt from Ch. 687, Laws of Md. 1979, S.B. 1058, Amendments to Chapter 849 of 1978 (Revision of Theft and Bad Check Laws), Explanation of Amendments.

Thus, the General Assembly adopted the Attorney General's suggestion and specifically amended the statute to eliminate any possible inference that reliance was an element of theft by deception by deleting the language "ob-

tains by deception" and substituting "uses deception to obtain and does obtain." The intent of the legislature being readily apparent not only from the very words of the statute but also its legislative history, we reject Cardin's claim that detrimental reliance is an element of theft by deception under the statute.

VI

Cardin assigns several points of error to the trial judge's conduct during the trial itself. We will examine each contention in turn.

A. *Voir dire*

Cardin claims that the trial judge unduly restricted the scope of *voir dire*. In particular, Cardin claims the trial court erred when it refused to permit specific questions concerning biases toward lawyers, bank practices, income tax practices and wealth. We disagree.

It is clearly the law that "[t]he purpose of the *voir dire* examination is to ascertain the existence of cause for disqualification and for no other reason." *Bremer v. State*, 18 Md.App. 291, 321, 307 A.2d 503 (1973), *cert. denied*, *Bremer v. Maryland*, 415 U.S. 930, 94 S.Ct. 1440, 39 L.Ed.2d 488 (1974) (citing *Borman v. State*, 1 Md.App. 276, 279, 229 A.2d 440 (1967)). The specific questions to be asked on *voir dire* lie within the sound discretion of the trial judge. *Bremer v. State*, *supra*, [18 Md.App.] at 321, 307 A.2d 503; *Rodgers v. State*, 4 Md.App. 407, 411, 243 A.2d 28 (1968), *cert. denied*, 252 Md. 732 (1969); *Culver v. State*, 1 Md.App. 406, 417, 230 A.2d 361 (1967). The questions asked on *voir dire* must go to a specific issue of eligibility; the court may in its discretion refuse those questions which are speculative "or in the nature of a fishing expedition." *Phenious v. State*, 11 Md.App. 385, 389, 274 A.2d 658, *cert. denied*, 262 Md. 748 (1971) (quoted in *Bremer v. State*, *supra* [18 Md.App.] at 321, 307 A.2d 503).

Cardin asked the court to question prospective jurors regarding their attitudes toward lawyers, bank practices, income tax practices and wealth. The judge declined to pose those questions to the jury. Cardin's counsel noted an exception to the denial, stating:

. . . there is going to be evidence in this case that Mr. Cardin was wealthy and he's also a lawyer, and . . . [the] questions . . . [are] designed to find out if people had backgrounds in those areas for the purpose of assisting us in even exercising pre-emptories which we also think is an important aspect of *voir dire*.

The questions posed by Cardin and declined by the trial court were clearly designed to aid Cardin's attorneys in making peremptory challenges, not to disclose such bias as would justify dismissal of a juror for cause. The court was fully within its discretion in denying those questions. Our review of the record discloses that the trial court afforded Cardin exhaustive *voir dire*. Each juror was questioned out of the presence of the rest of the panel. This occurred over a three-day period and produced in excess of 450 pages of transcript. We are persuaded that every effort was made to ensure that each juror was free of bias.

B. *Dismissal of a Juror for Cause*

Cardin claims that the trial judge erred when, during *voir dire*, he refused to dismiss for cause a juror whose friends were Old Court depositors. This contention is entirely without merit. It is well established that "[a] juror may be struck for cause only where he or she displays a predisposition against innocence or guilt because of some bias extrinsic to the evidence to be presented." *McCree v. State*, 33 Md.App. 82, 98, 363 A.2d 647 (1976), citing *Johnson v. State*, 9 Md.App. 143, 149, 262 A.2d 792 (1970). The juror in this case displayed no such predisposition. She testified during *voir dire* that

she had not discussed Old Court with her friends who were depositors, that she could "keep an open mind," and that she knew one of the character witnesses for Cardin. There is no evidence that the juror at issue was biased, or that the judge abused his discretion in denying Cardin's request for disqualification.

C. *The Closing Argument*

Cardin claims that the State's closing argument was inflammatory and improper. We disagree; the State's closing argument was in fact quite restrained.

Cardin points to the following statements made during the State's closing argument:

It is an old saying. Whether you are rich or poor, it is nice to have money. *The more you have the more you want.* That saying applies in this case.

* * * *

Jerome Cardin is not the first person of wealth to steal. Unfortunately, he probably won't be the last.

* * * *

Essentially, the defendant would like you to believe he is not the type of person who would steal. . . . Can you tell by the way a person looks whether he would steal? Can you tell by the way he dresses? *We all know it isn't the inner city kids with sweat shirts that steal but from time to time, people in white collars, fancy clothes do so because greed knows no class.*

We see nothing inflammatory about those statements. They were clearly within the allowable scope of the State's argument.

To be sure, we have on occasion held that closing statements made by the State amounted to reversible error. In *Killie v. State*, 14 Md.App. 465, 287 A.2d 310 (1972), we held it was prejudicial for the State to refer to the

defendant's homosexuality for the first time in closing argument, where appellant's sexual preferences were totally irrelevant and likely to prejudice the jury. In *Conway v. State*, 7 Md.App. 400, 256 A.2d 178 (1969), we held that the State committed reversible error when it disclosed appellant's prior conviction of assault with intent to rape during its closing argument in appellant's trial for rape. See also *Shoemaker v. State*, 228 Md. 462, 180 A.2d 682 (1962) (reversible error for the State on closing argument to urge the jurors to resolve all doubts in favor of the State because even if they made a mistake no great harm would be done since the defendant might soon be paroled).

Despite such rare instances of reversal for prosecutorial error, it is still well established that:

While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions. See 53 Am.Jur. Trial § 453 (1956).

Wilhelm v. State, 272 Md. 404, 413, 326 A.2d 707. (1974). What appellant complains of was well within the permissible bounds of advocacy.

D. *The Court's Examination of Cardin*

Cardin testified in his own defense; he was the last witness at his trial. He was on the witness stand for

two days and his testimony produced 398 pages of transcript. Following the State's cross-examination, the court undertook to question Cardin. The court's questions and Cardin's responses are contained in 10 pages of trial transcript, and one document was entered into evidence. Following this examination, the trial judge commented that "[the] court understands its obligation to sharpen issues and seek the truth whenever it can. . . ." Cardin claims the court's cross-examination of him amounted to reversible error. We disagree.

It is the law in Maryland that "[t]he questioning of the trial judge showing his disbelief of the witness' testimony [is] beyond the line of impartiality over which a judge must not step." *Vandegrift v. State*, 237 Md. 305, 311, 206 A.2d 250 (1965). In *Vandegrift*, the Court of Appeals held that it was error for a trial judge to question a witness repeatedly on the same matter and to remind the witness that he was under oath and subject to penalties for perjury. Such behavior by the trial judge "amounted to a manifestation of his disbelief of the witness, which we must presume influenced the jury, whose function it was as the triers of facts to determine the credibility of the witnesses." *Id.* at 310, 206 A.2d 250. Because the trial judge improperly influenced the jury, the *Vandegrift* Court was "forced to conclude that the manner of the questioning by the trial judge amounted to . . . prejudicial error." *Id.* at 310, 206 A.2d 250.

In *Brown v. State*, 220 Md. 29, 150 A.2d 895 (1959), the Court of Appeals stated that the trial judge's questioning of the defendant, which "indicate[d] sarcastically, so that the jury could not have failed to understand, that the judge did not believe the story the defendant was telling," was "clearly improper." *Id.* at 39, 150 A.2d 895. And in *Marshall v. State*, 297 Md. 205, 434 A.2d 555 (1981), the Court of Appeals held that the trial court committed reversible error where it warned the defendant, out of the presence of the jury, of the penalties

of perjury. The *Marshall* Court stated: "a defendant in every case, whether it is a jury trial or not, is entitled to an impartial judge. A defendant is plainly denied this right when the judge's participation in the trial stifles the defendant's ability to freely present all of the competent evidence available." *Id.* at 214, 434 A.2d 555.

We recently had the opportunity to address the limits of permissible interrogation of witnesses by a trial judge in *Smith v. State*, 66 Md.App. 603, 505 A.2d 564, *cert. denied*, 306 Md. 371, 509 A.2d 134 (1986). In *Smith*, we found the late Judge Lowe's observations in *Bell v. State*, 48 Md.App. 669, 429 A.2d 300 (1981), to be particularly enlightening:

The trial judge's role is that of an impartial arbitrator and that appearance is not generally compatible with an inquisitorial role. It is the better practice for a trial judge to inject himself as little as possible in a jury case, *United States v. Green*, 429 F.2d 754, 760 (D.C.Cir.1970), because of the inordinate influence that may emanate from his position if jurors interpret his questions as indicative of his opinion. *See, also, Patterson [v. State]*, 275 Md. 563, 578-80 [342 A.2d 660] (1975). The appearance that a judge may have abandoned his role as an impartial arbitrator, is especially hazardous when cross-questioning a defendant.

Yet, if counsel have faltered in their advocacies, it is not improper for a trial judge to be "meticulously careful to make sure that the full facts [are] brought out," *Jeffries v. State*, 5 Md.App. 630, 632 [248 A.2d 807] (1969), or to seek to discover the truth when counsel have not elicited some material fact, or indeed when a witness has not testified with entire frankness. Annot., 84 A.L.R. 1172, 1193 (1933). Such questioning may even bear upon the credibility of a defendant in a proper circumstance.

Madison v. State, 200 Md. 1, 12 [87 A.2d 593] (1952); *King v. State*, 14 Md.App. 385, 393-94 [287 A.2d 52] *cert. denied*, 265 Md. 740 (1972). This should be achieved expeditiously, however, if at all, for a protracted examination has a tendency to convey to a jury a judge's opinion as to facts or the credibility of witnesses.

Smith v. State, *supra* [66 Md.App.], at 618-19, 505 A.2d 564 (quoting *Bell v. State*, *supra* [48 Md.App.], at 678, 429 A.2d 300).

Whether a trial judge's interrogation of a witness or party has in fact conveyed to the jury the judge's opinion as to the facts or the credibility of the witness must be determined by all the facts and circumstances attending the questions posed by the trial judge in each particular case. What would be an innocuous question in one circumstance could be highly prejudicial in another. In many instances, much will depend upon the judge's tone of voice, facial expression, or other factors that cannot be assessed by reviewing a cold printed record devoid of expression or inflection. We must make our determination on the basis of the language of the questions alone. On that basis, in this case we are not persuaded that the trial judge crossed that fine line between "sharpening the issues" and conveying an impression of doubt as to the witness's credibility.

Initially, the trial judge questioned Cardin regarding the legal differences between solo practice and practice in a firm or professional association. Cardin explained these differences and gave a brief history of his firm, Cardin & Cardin, P.A. The court then asked Cardin: "When you practiced law, did you practice law in your name individually or as a member of Cardin & Cardin, P.A.?" Cardin responded as follows: "I can't answer that question, sir. I practiced law as Jerome Cardin." In response to further questioning, Cardin revealed that the sale of Old Court to Levitt and Pearlstein was a "private sale."

The trial judge then asked Mr. Cardin to review several defense exhibits. At the trial court's request, Cardin explained that the exhibits were retainer agreements which retained the firm of Cardin & Cardin, P.A., and further explained that payments received pursuant to the retainers "went into the firm."

The trial judge then asked Cardin whether monies due pursuant to the fee splitting agreement would rightfully go to the firm. Cardin explained that, pursuant to the fee splitting agreement, all payments due "would be the firm's, ours or anyone we would direct it to. . . ." Cardin read the applicable portion of the fee splitting agreement to the judge: "Furthermore, I understand that the work to be performed by each of us under the agreement may be performed by Jeffrey A. Levitt, Cardin & Cardin, P.A. or the designee of either . . . and the fees will be collected and paid accordingly.'" The trial judge asked if Cardin had ever executed a document designating the payee of the fee splitting agreement to be someone other than the firm of Cardin & Cardin, P.A., and Cardin responded in the negative.

The court then questioned Cardin concerning a document which was not in evidence but which had been produced in an unrelated civil case before another judge. That document had no relevance to the criminal charges against Cardin; it was a letter from Jonathan Greenstein to Jeffrey Levitt and Allan Pearlstein relating to Levitt's and Pearlstein's payments on notes executed in connection with their purchase of Old Court. The trial judge asked why the letter apparently directed Levitt and Pearlstein to make their payments to Cardin's firm, and Cardin testified that "Cardin & Cardin, P.A. was acting as an escrow [agent] for these funds and we were getting money from Levitt and Mr. Pearlstein and were distributing the amounts owed to each." The trial judge did not pursue his questioning further, and the Greenstein letter was not admitted in evidence.

The form and language of the questions themselves do not indicate any error or abuse of judicial discretion. The judge's questions of Cardin followed a long trial on complicated issues involving charges of complex white collar crimes. It was within the judge's discretion to elicit for the benefit of the jury the basic differences between an incorporated law firm and a solo practice, particularly with respect to billing and receiving fees, even if it had the effect of pointing out discrepancies in Cardin's testimony. Certainly, Cardin was given an adequate chance to respond, and his attorney also had an opportunity to ask him questions and elicit additional exculpatory explanations from him.

In summary, the court's interrogation of Cardin does not on its face reveal any display of partiality in the judge. The judge in this case, unlike the judge in *Vandegrift*, did not warn the witness, in front of the jury, of the penalties of perjury; and unlike the trial judge in *Brown*, he did not use words that tended to display sarcasm or a disbelief of the witness's testimony.

Cardin's brief, through a liberal use of italics, implies that the trial judge indicated to the jury his disbelief of Cardin by emphasizing certain words and phrases. Cardin also stresses the fact that when defense counsel objected to the "accusatory tone" of the court's questions, that characterization was not disputed by the judge or the State's Attorney. The situation, however, did not demand a verbal response, and the trial judge implicitly rejected appellant's assessment of his conduct in denying appellant's motion for a mistrial. Neither the italics in the brief nor the form of the objection persuades us that the characterization of the judge's tone as "accusatory" was correct. As we pointed out, *supra*, we cannot look beyond the words themselves. Moreover, in the course of instructing the jury, the trial judge emphasized that any comments he had made or questions he had asked during the course of the trial should not be taken as any

indication of the court's belief as to the truth of the evidence or the weight to be given it. Such instruction would tend to negate any possible misinterpretation of the court's questioning of Cardin. As we recently stated in *Brooks v. State*, 68 Md.App. 604, 613, 515 A.2d 225 (1986), "... when curative instructions are given, it is presumed that the jury can and will follow them. *Bru-ton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968); *Wilson v. State*, 261 Md. 551, 570, 276 A.2d 214 (1971)."

Appellant also assigns prejudicial error to the fact that the trial court questioned him regarding a document which was not admitted into evidence. We agree that it was improper for the court to do so; however, the letter was not relevant to the proceedings at hand, and since the trial judge ceased all questions after giving Cardin an opportunity to explain the letter to the jury, we believe the letter and the questions and answers concerning it were so innocuous that they could have played no material part in the results of the case. The error, therefore, was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665 (1976).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-862

JEROME S. CARDIN

Applicant,

v.

MARYLAND

Order Extending Time To File Petition For Writ of
Certiorari

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 26, 1988.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 11th day of May, 1988.

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. VI (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV (1868)

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MD. ANN. CODE, Art. 27, §§ 340-343 (1980)

§ 340. DEFINITIONS.

In this subheading, the following words have the meanings indicated.

(a) "*Coin machine*" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed to receive a coin, or bill, or a token made to be received by the machine, and in return for the insertion or deposit thereof, automatically to offer, to provide, to assist in providing, or to permit the acquisition of some property or service.

(b) (1) "*Deception*" means knowingly to:

(i) Create or confirm in another an impression which is false and which the offender does not believe to be true; or

(ii) Fail to correct a false impression which the offender previously has created or confirmed; or

(iii) Prevent another from acquiring information pertinent to the disposition of the property involved; or

(iv) Sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether the impediment is or is not of value or is not a matter of official record; or

(v) Insert or deposit a slug in a coin machine.

(vi) Remove, alter, or otherwise disfigure any label or price tag; or

(vii) Promise performance which the offender does not intend to perform or knows will not be performed. The defendant's intention or knowledge that a promise would not be performed shall not be established by or inferred from the fact alone that the promise was not performed.

(2) "Deception" does not include puffing or false statements of immaterial facts and exaggerated representations unlikely to deceive ordinary persons.

(c) "*Deprive*" means to withhold property of another:

(1) Permanently; or

(2) For such a period as to appropriate a portion of its value; or

(3) With the purpose to restore it only upon payment of reward or other compensation; or

(4) To dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

(d) "*Exerts control*" includes but is not limited to the taking, carrying away, appropriating to one's own use or sale, conveyance, transfer of title to, interest in, or possession of property. The term "exerts control" does not include trespassing on the land of another or occupying without authorization the land of another.

(e) "*Knowingly*"—A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is practically certain that the result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is practically certain of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

(f) "*Obtain*" means:

(1) In relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and

(2) In relation to services, to secure the performance thereof.

(g) "*Owner*" means a person, other than the offender, who has possession of or any other interest in the property involved, even though that interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

(h) "*Property*" means anything of value, including but not limited to:

- (1) Real estate;
- (2) Money;
- (3) Commercial instruments;
- (4) Admission or transportation tickets;
- (5) Written instruments representing or embodying rights concerning anything of value, or services, or anything otherwise of value to the owner;
- (6) Things growing on or affixed to, or found on land, or part of or affixed to any building;
- (7) Electricity, gas, and water;
- (8) Birds, animals, and fish which ordinarily are kept in a state of confinement;
- (9) Food and drink;
- (10) Samples, cultures, micro-organisms, specimens;
- (11) Records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes or models thereof; or any other articles, materials, devices, substances, and whole or partial copies, descriptions, photographs, prototypes, or models thereof which represent evidence, reflect or record secret scientific, technical, merchandising production or management information, designed process, procedure, formula, invention, trade secret, or improvement;

(12) Financial instruments, information, electronically produced data, computer software and programs in either machine or human readable form, and other tangible or intangible items of value.

(i) "*Property of another*" means real or personal property in which a person other than the offender has an interest which the offender does not have authority to defeat or impair, even though the offender himself may have an interest in the property.

(j) "*Service*" includes, but is not limited to:

- (1) Labor or professional service;
- (2) Telecommunication, public utility, toll facilities, or transportation service;
- (3) Lodging, entertainment, or restaurant service; or
- (4) The use of equipment (including, but not limited to, computers and other data processing equipment).

(k) "*Slug*" means an object or article which, by virtue of its size, shape, or any other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a coin, bill, or token required for the operation of the machine.

(l) (1) "*Value*" means the market value of the property or service at the time and place of the crime, or if the market value cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime.

(2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value, shall be evaluated as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be determined as the amount due or collectible thereon or thereby, this figure ordinarily being the face

amount of the indebtedness less any portion thereof which has been satisfied.

(ii) The value of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be determined as the amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(3) The value of a trade secret which does not have a readily ascertainable market value shall be deemed any reasonable value representing the damage to the owner suffered by reason of losing an advantage over those who do not know of or use the trade secret.

(4) When it cannot be determined if the value of the property or service is more or less than \$300 by the standards set forth in this subsection, its value shall be determined to be an amount less than \$300.

(5) When theft is committed in violation of this subheading pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the value of the property or services aggregated in determining whether the theft is a felony or a misdemeanor.

§ 341. ACTS CONSTITUTING THEFT.

Conduct designated as theft in this subheading constitutes a single crime embracing, among others, the separate crimes heretofore known as larceny, larceny by trick, larceny after trust, embezzlement, false pretenses, shoplifting, and receiving stolen property. An accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this subheading, notwithstanding the specification of a different manner in the information, indictment, warrant, or other charging document, subject only to the power of the

court to ensure a fair trial by granting a continuance or other appropriate relief if the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

§ 342. THEFT.

(a) *Obtaining or exerting unauthorized control.*—A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner, and:

(1) Has the purpose of depriving the owner of the property; or

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

(b) *Obtaining control by deception.*—A person commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control over property of the owner, and;

(1) Has the purpose of depriving the owner of the property; or

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(c) *Possession of stolen property.*—(1) A person commits the offense of theft if he possesses stolen personal

property knowing that it has been stolen, or believing that it has probably been stolen, and:

(i) Has the purpose of depriving the owner of the property; or

(ii) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(iii) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(2) The requisite knowledge may be inferred in the case of a person in the business of buying or selling goods who:

(i) Is found in possession or control of property stolen from two or more persons on separate occasions; or

(ii) During the year preceding the criminal possession charged, has acquired stolen property in a separate transaction; or

(ii) Being a person in the business of buying or selling property of the sort possessed, acquired it for a consideration which he knew was far below its reasonable value.

(3) In any prosecution for theft by possession of stolen property under this section, it is not a defense that:

(i) The person who stole the property has not been convicted, apprehended, or identified; or

(ii) The defendant stole or participated in the stealing of the property; or

(iii) The stealing of the property did not occur in this State.

(4) A person who criminally possesses stolen property and a person who has stolen the property are not accom-

plices in theft for the purpose of any rule of evidence requiring corroboration of the testimony of an accomplice, unless the person who criminally possesses the property had participated in the stealing.

(d) *Obtaining control of lost, mislaid or mistakenly delivered property.*—A person commits the offense of theft when he obtains control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or nature or amount of the property if he:

(1) Knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner; and

(2) Fails to take reasonable measures to restore the property to the owner; and

(3) Has the purpose of depriving the owner permanently of the use or benefit of the property either when he obtains the property, or at any later time.

(e) *Obtaining services by deception.*—A person commits the offense of theft when he obtains the services of another which are available for compensation by:

(1) Deception; or

(2) Knowing that the services are provided without the consent of the person providing them.

(f) *Penalty.*—(1) A person convicted of theft where the property or services that was the subject of the theft has a value of \$300 or greater is guilty of a felony and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than \$1,000, or be imprisoned for not more than 15 years, or be both fined and imprisoned in the discretion of the court.

(2) A person convicted of theft where the property or services that was the subject of the theft has a value of

less than \$300 is guilty of a misdemeanor and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than \$500, or be imprisoned for not more than 18 months, or be both fined and imprisoned in the discretion of the court; however, all actions or prosecutions for theft where the property or services that was the subject of the theft has a value of less than \$300 shall be commenced within two years after the commission of the offense.

§ 343. DEFENSES AND PRESUMPTIONS.

(a) (1) It is not a defense to the offense of theft that the defendant has an interest in the property which was the subject of the theft if another person also has an interest or right of possession in the property that the defendant is not entitled to infringe.

(2) The following delineate the right of possession:

(i) A joint or common owner of property does not have a right of possession of the property superior to that of any other joint or common owner of the property.

(ii) In the absence of an agreement to the contrary, a person in lawful possession of property has a right of possession superior to that of a person having only a security interest in the property, even if legal title to the property lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

(b) It is not a defense to theft that the property was taken, obtained, or withheld from a person who had obtained possession of the property, by illegal means.

(c) It is a defense to the offense of theft that:

(1) The defendant acted under a good faith claim of right to the property involved;

(2) The defendant acted in the honest belief that he had the right to obtain or exert control over the property as he did;

(3) The property involved was that of defendant's spouse, unless the defendant and the defendant's spouse were not living together as man and wife and were living in separate abodes at the time of the alleged theft; or

(4) In cases of theft of a trade secret, that the defendant rightfully knew the trade secret or that it was available to him from a source other than the owner of the trade secret.

(d) All common law and evidentiary presumptions applicable on July 1, 1979 to offenses which are consolidated under the provisions of this subheading are also applicable to the offense of theft, unless specifically repealed or modified by the provisions of this subheading, or unless modified by court decisions rendered after July 1, 1979.

APPENDIX E

Tr. 11/25/86, pp. 222-232

THE COURT: Mr. Kelberman, any recross?

MR. KELBERMAN: No, Your Honor.

THE COURT: Mr. Cardin, let me ask you a couple of questions, please.

THE WITNESS: Yes, sir.

THE COURT: What is the purpose of setting up a P A with relation to a law firm?

THE WITNESS: Well, at the time it was done, it was done because there were certain tax advantages, as I understand, sir.

We were advised to do that by the tax people.

THE COURT: Who were the principles in Cardin and Cardin P. A.

THE WITNESS: I'm the sole stockholder, sir.

THE COURT: Who was the second Cardin then?

THE WITNESS: My father.

We used the name Cardin and Cardin P. A. because in 1918 my father established the firm, went in the practice of law then his brother, Meyer Cardin, came with him and they started what—Meyer Cardin, Judge Cardin, graduated from law school and became an attorney. That is when they started the law firm, Cardin and Cardin.

Cardin and Cardin was started way back in the twenty's and it carried through and then we maintained that.

We changed it at one time to Cardin and Weinstein, then we changed it back to Cardin and Cardin because that is the way my father wanted it.

THE COURT: P A stands for Professional Association?

THE WITNESS: Yes, sir.

THE COURT: It is a corporation which is a separate legal entity from Jerome Cardin or any other specific individual, is it not?

THE WITNESS: Yes, sir. A legal entity, yes sir.

THE COURT: When you practiced law, did you practice law in your name individually or as a member of Cardin and Cardin P A?

THE WITNESS: I can't answer that question, sir. I practiced law as Jerome Cardin.

THE COURT: Will you give Mr. Cardin defendant's exhibit forty-four through forty-nine, please?

While we're getting those exhibits, Mr. Cardin, the sale of your interest in Old Court to Mr. Levitt and Mr. Pearlstein, that was a private sale, was it not between you and Mr. Levitt and Mr. Pearlstein?

THE WITNESS: It was a private sale, yes, sir.

THE COURT: I want you to look first of all at the exhibits that you have been given, forty-nine through—forty-four through forty-nine.

THE WITNESS: Yes, sir.

THE COURT: That is a series of letters, retainers on the letterhead of Cardin and Cardin P A, the first two, forty-four and forty-five are dated September 26th, 1983, correct?

THE WITNESS: Correct sir.

THE COURT: Those letters are signed by whom on behalf of Cardin and Cardin P A?

THE WITNESS: These are not signed but it is typed in Jerome Cardin.

THE COURT: All right. And they are what? What would you characterize those letters as being sir?

THE WITNESS: Retainers.

THE COURT: And who do they retain?

THE WITNESS: They retain our firm, Cardin and Cardin.

THE COURT: So they retained the firm of Cardin and Cardin and not you individually as a sole practitioner of law, don't they?

THE WITNESS: Well, they retain—when they retain the firm, Cardin and Cardin, they retain me, sir.

THE COURT: No where in the letter is they are retaining the services of Jerome Cardin. It says you are retaining our firm as your general counsel.

THE WITNESS: Correct.

THE COURT: That is Cardin and Cardin P A.

THE WITNESS: Correct.

THE COURT: Now, on defendant's exhibit 46 and defendant's exhibit forty-seven, who has signed those on behalf of the firm?

THE WITNESS: Sanford Cardin.

THE COURT: And what are they, would you characterize them for me, please?

THE WITNESS: They are also retainer letters.

THE COURT: Who do they retain?

THE WITNESS: Also retain the firm of Cardin and Cardin.

THE COURT: They are not signed by you, are they?

THE WITNESS: No, sir.

THE COURT: And now defendant's exhibit forty-eight and forty-nine, they are letters dated February 14th, 1984. Would you tell us who signed those?

THE WITNESS: My son Sanford, sir.

THE COURT: What are they?

THE WITNESS: Retainers.

THE COURT: Who is retained?

THE WITNESS: The firm, sir.

THE COURT: When you perform legal services under a retainer that retains your firm, what do you do with the funds that are paid to the firm?

THE WITNESS: They would go into the firm, sir.

THE COURT: Did any of the funds you received in this case go into your firm?

THE WITNESS: The eighteen thousand dollars, all the monies paid under these retainers went into the firm, sir.

THE COURT: You testified earlier after the middle of 1984 that these agreements were no longer involved and that you were getting these funds for your share of some profits from Old Court, is that correct?

THE WITNESS: No, sir, I did not testify to that, sir.

THE COURT: You didn't testify to that?

THE WITNESS: No, sir.

THE COURT: Would you tell us what you did testify to?

THE WITNESS: I testified to the fact that these fund—are you talking about the other funds I received other than the O C I C and O C J V were paid under my agreement with Mr. Levitt as part of my share of the closing fees that he had collected.

THE COURT: But if they were the share of the closing fees, were they not a part of the monies that were due to your firm and not to you personally?

THE WITNESS: No, sir.

THE COURT: Why not?

THE WITNESS: Because Mr. Levitt and I had agreed that it would be the firm's, ours or anyone we would direct it to, sir.

THE COURT: Do you have anything that memorializes that understanding, sir?

THE WITNESS: I believe so, sir.

[THE COURT:] Do you have the originals?

[THE WITNESS:] I think it is in there.

THE COURT: Which exhibit do you have?

MR. DANIEL: Defendant's Exhibit 39.

THE WITNESS: On page two, sir, paragraph three, the bottom of the page:

"Furthermore I understand that the work to be performed by each of us under the agreement may be performed by Jeffrey A Levitt, Cardin and Cardin, P. A. or the designee of either (IE. title company) and the fees will be collected and paid accordingly."

THE COURT: That says Cardin and Cardin P A, doesn't it?

THE WITNESS: Or the designee of either.

THE COURT: Do you have any documents which designate anyone other than those two named individuals anywhere?

THE WITNESS: No, sir.

THE COURT: And that document is on Cardin and Cardin P A stationery, isn't it?

THE WITNESS: Yes.

THE COURT: Will you give this to Mr. Cardin, please?

Mr. Cardin, will you be kind enough to look at the second document there and tell us what that document is, please?

You can review the whole thing. I think it's three pages.

THE WITNESS: This appears to be the—without having read it carefully—

THE COURT: Read it carefully, take as much time as you like, sir.

(Whereupon, there was a pause in the proceedings.)

THE WITNESS: Yes, sir.

THE COURT: You have read it now?

THE WITNESS: Yes, sir.

THE COURT: What is the document?

THE WITNESS: This is a letter from Jonathan Greenstein to Jeffrey Levitt and Allan Pearlstein calling for payments on the notes which were—which represented one half of the amount of the purchase price of the stock Mr. Levitt and Mr. Pearlstein having paid half in cash and half by note.

THE COURT: Which stock are we talking about?

THE WITNESS: This is the stock that they purchased from these individuals of Old Court.

THE COURT: Would you look at the handwriting on page three and tell me whose handwriting that is, sir, if you recognize it?

THE WITNESS: No, sir, I don't recognize that.

THE COURT: You don't recognize the handwriting?

THE WITNESS: No, sir.

THE COURT: What does that handwriting say?

THE WITNESS: "Check to be made payable to Cardin and Cardin."

THE COURT: Can you tell us why that check was to be made payable to Cardin and Cardin for something Cardin and Cardin had nothing to do with?

THE WITNESS: Cardin and Cardin was acting as the escrow act for these funds and we were getting money from Levitt and Mr. Pearlstein and were distributing the amounts owed to each.

THE COURT: I have no other questions.

Does either counsel have questions in light of the Court's questions, Mr. Daniel?

MR. DANIEL: I have none.

MR. KELBERMAN: No, sir.

THE COURT: Mr. Cardin, you may step down.

THE WITNESS: Thank you, sir.

THE COURT: Defense have another witness?

MR. DANIEL: No, we rest.

THE COURT: Counsel, will you approach the bench, please?

(Whereupon, counsel and the defendant approached the bench and the following conference ensued at the bench on the record:)

THE COURT: State have any rebuttal?

MR. KELBERMAN: No rebuttal, Your Honor.

MR. DANIEL: Like to move for a mistrial on the basis of the court's cross-examination of our client.

The court clearly indicated in terms of its tone and manner of questions that it has departed from its role of impartiality, challenged credibility matters that were not put in evidence; took from the file things that were not relevant matters. Took the file and then proceeded to cross-examine our client with regard to handwriting which the defendant said was not his and he didn't know anything about and the court did so in a tone which was clearly accusatory and that Mr. Kelberman on behalf of the State did not cross-examine my client on any of those matters and the court went far beyond that.

THE COURT: Court understands its obligation to sharpen issues for the Jury and seek the truth whenever it can, Mr. Daniel, and the court denies your motion.

* * * *

